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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ELLIS CARTER,

Defendant and Appellant.

F056008

(Super. Ct. No. BF118702A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Colette M. Humphrey, Judge.

James F. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Wiseman, Acting P.J., Cornell, J., and Hill, J.

Appellant, Ellis Carter, pled no contest to assault with a firearm (Pen. Code, § 245, subd. (a)(2)).<sup>1</sup> On appeal, Carter contends the court violated the terms of his plea bargain. We will affirm.

### **FACTS**

In March 2007, Patricia Weeams was involved in a relationship with Carter that she was trying end. On March 29, 2007, Carter called Weeams and told her that if he could not have her ““then nobody [could].”” At approximately 8:20 p.m., Weeams was watering her front lawn when Carter drove by on a bicycle. As Weeams bent down to move some sprinklers, she heard two shots and ran toward her residence. A bullet fragment struck Weeam’s left arm causing a small cut.

Officers responded to Carter’s residence just as Carter drove up and found a bicycle in his vehicle. During a search of the residence, the officers found .44-caliber ammunition and a shotgun.

On August 9, 2007, the district attorney filed an information charging Carter with assault with a firearm (count 1-§ 245, subd. (a)(2)), discharging a firearm in a grossly negligent manner (count 2-§ 246.3), and attempted murder (count 3-§§ 664, 187, subd. (a)). Count 3 also alleged that a principal was armed during the commission of the offense charged in that count (§ 12022, subd. (a)(1)).

On June 13, 2008, Carter entered his plea in this matter pursuant to a plea bargain. The terms of the agreement were explained on the record as follows:

“THE COURT: And there appears to be a change of plea. I’m not sure if I know if I can recite it precisely. So, Mr. Kang [defense counsel], if you want to recite it for the record:

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<sup>1</sup> All further statutory references are to the Penal Code.

“MR. KANG: Your Honor, there will be a no contest plea entered as to Count One for a lid of two years. Sentencing [is] to be put off for two months.

“THE COURT: There’s some other writing here. I don’t know if this was encapsulated in the final agreement or not.

“The defendant [will] stipulate to stay away, I presume, from a specific individual. And the rest of the wording is, ‘if violated, upper term four-year lid.’

“MR. KANG: Correct. If -- he is to agree to have [the court issue an order requiring him to stay away from] Patricia Weeams, W-e-e-a-m-s, the alleged victim in this case.

“If he were to violate this court order, he would essentially have no plea bargain and have just the Count One with no promises as to the sentence.”

In advising Carter of the consequences of his plea, the court did not advise Carter that pursuant to section 1203, subdivision (e)(2) (hereafter section 1203(e)(2)) his use of a firearm made him ineligible for probation unless the court found that Carter’s case was “an unusual case where the interests of justice would best be served by a grant of probation.” After taking Carter’s plea to count 1, the court granted the prosecutor’s motion to dismiss the remaining counts and enhancement.

On August 26, 2008, the court, without objection, sentenced Carter to the mitigated term of two years.

### **DISCUSSION**

Carter’s personal use of a firearm to commit the assault offense made him ineligible for probation absent a finding of unusual circumstances. (§ 1203(e)(2).) Carter contends that because his plea agreement did not inform him probation would be available only if the court found unusual circumstances and the prosecution did not object to the agreement or state any reservations, the prosecutor bargained away this limitation.

Thus, according to Carter, the court violated the terms of his plea bargain when it used the probation limitation of section 1203(e)(2) to deny him probation. We disagree.

“The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.] Pursuant to this procedure the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. [Citation.] This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment [citation], by the People’s acceptance of a plea to a lesser offense than that charged, either in degree [citations] or kind [citation] or by the prosecutor’s dismissal of one or more counts of a multi-count indictment or information. (1) Judicial approval is an essential condition precedent to the effectiveness of the ‘bargain’ worked out by the defense and prosecution. [Citations.] But implicit in all of this is a process of ‘bargaining’ between the adverse parties to the case-the People represented by the prosecutor on one side, the defendant represented by his counsel on the other-which bargaining results in an agreement between them. [Citation.]” (*People v. Orin* (1975) 13 Cal.3d 937, 942-943.)

Carter’s contention that his plea bargain contained a waiver of section 1203(e)(2)’s probation limitation is premised on his assertion that during the change of plea proceedings the court stated the terms of the agreement on the record. However, his appellate attorney misrepresents the record because the terms of Carter’s plea bargain were stated on the record by defense counsel, not the court. Further, as relevant here, in reciting the terms of the bargain defense counsel stated only that it provided for a “lid” of two years. The agreement did not address any restrictions on the court’s ability to grant probation, it did not contain an explicit or implicit promise by the court or the prosecutor of a waiver of this probation limitation, nor was there a mutual understanding that this limitation would be waived. “At most, there is an asserted ignorance on the part of [Carter], unsupported by objective evidence of its existence or reasonableness, that [a grant of probation was limited by section 1203(e)(2)]. (*In re Chambliss* (1981) 119

Cal.App.3d 199, 202; also cf. *People v. McClellan* (1993) 6 Cal.4th 367, 379 [“court’s omission, at the change of plea hearing, of advice regarding defendant’s statutory obligation to register as a sex offender did not transform the court’s error into a *term of the parties’ plea agreement*”]; *People v. Lopez* (1998) 66 Cal.App.4th 615, [no evidence that omission of standard gang probation condition was part of the plea bargain].)

Additionally, Carter’s probation report clearly stated that Carter was not eligible for probation absent a finding of unusual circumstances and that “the undersigned officer could find no unusual circumstances to overcome this rule of presumptive ineligibility.” Further, during the sentencing hearing the court stated, “The defendant is not eligible for probation and there are no unusual circumstances to justify a grant of probation, especially in light of the serious facts of the case.” In view of these circumstances, the failure of defense counsel or Carter to object at sentencing to Carter’s presumptive ineligibility for probation further indicates that Carter’s plea bargain did not provide for a waiver of section 1203(e)(2)’s probation limitation.

Carter misplaces his reliance on *People v. Spears* (1984) 153 Cal.App.3d 79 to support his contention that the court violated his plea bargain. In *Spears*, two defendants and several other men went to a house where one of the defendants struck the male resident on the head with a gun and accused him of stealing his marijuana crop. The defendants took the male resident to another location where they instructed him to locate the marijuana using the telephone or be killed. The defendants were arrested by police that day and were charged with numerous Penal Code violations. (*Id.* at pp. 81-82.)

One defendant pled guilty to felony false imprisonment and admitted an arming enhancement. The other defendant pled guilty to assault with a deadly weapon and felony false imprisonment. However, each defendant subsequently filed a motion to withdraw their plea that was denied by the trial court. In reversing the trial court’s denial of these motions, the *Spears* court found that the defendants had been led to believe that

probation was likely when, in fact, it was statutorily disfavored and required the finding of unusual circumstances. (*Id.* at p. 87.)

*Spears* is inapposite because the issue there was whether the trial court abused its discretion in denying the defendants' motions to withdraw their pleas; it did not involve an alleged violation of a plea bargain by the trial court. Further, although the court here failed to advise Carter that as a consequence of his plea he was subject to the probation limitation of section 1203(e)(2), he waived any error in the court's omission by his failure to object in the trial court. (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.)

Moreover, by sentencing Carter to a two-year term the court sentenced him within the parameters of his negotiated plea. Accordingly, we reject Carter's contention that the court violated the terms of his plea bargain.

#### **DISPOSITION**

The judgment is affirmed.